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No. 81-1458

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH C. RUSSELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that there was a fatal variance between the counts of the indictment charging him with racketeering, conspiracy, and mail fraud and the evidence introduced at trial. He also adopts certain arguments made by his co-defendants in petitions for a writ of certiorari now pending before this Court.

1. Petitioner and 19 others were charged in a multi-count indictment returned in the United States District Court for the Middle District of Florida.[1] After a three-month jury trial, petitioner was convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute (18 U.S.C. 1962(d)), of participating in the conduct

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[1] Petitions for certiorari have earlier been filed by nine co-defendants. See Brief for the United States in Opposition to Petitions for a Writ of Certiorari in Nos. 81-905, 81-907, 81-956, 81-5700, 81-5716, 81-5748, 81-5820, 81-5826, 81-5865.

of the affairs of a RICO "enterprise" through a pattern of racketeering activity (18 U.S.C. 1962(c)), and of two counts of mail fraud (18 U.S.C. 1341).[2] The court of appeals affirmed his conviction (Pet. App. 1a-49a).[3]

The evidence is summarized in the opinion below (Pet. App. 2a-3a, 17a-30a) and is discussed in our Brief in Opposition to the Petitions for a Writ of Certiorari filed by petitioner's co-defendants (Nos. 81-905, 81-907, 81-956, 81-5700, 81-5716, 81-5748, 81-5820, 81-5826, 81-5865). We are serving petitioner with a copy of that brief.

The evidence established that an enterprise operating in Tampa and Miami, Florida, from 1973 to 1976 engaged in numerous acts of arson for the purpose of defrauding insurance companies. The enterprise included arsonists, an insurance adjustor, property owners and investors, and a realtor and financier (Pet. App. 2a-3a).

The primary arsonist in the enterprise, Willie Noriega, pleaded guilty and testified for the government at trial.[4] His testimony outlined the roles and activities of each of the co-defendants in the conduct of the enterprise's affairs. Petitioner Russello participated in the enterprise as a property owner (Pet. App. 4a, 43a-44a, 48a). He arranged for Noriega and co-conspirator Jimmy Traina to set fire to the

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[2]Petitioner was sentenced to the following concurrent terms of imprisonment: 10 years for conspiracy to violate RICO, 10 years for the substantive RICO violation, and five years on each mail fraud count (Pet. App. 2a n.1).

[3]In a separate consolidated appeal, the court of appeals reversed a forfeiture of $340,043.09 entered under 18 U.S.C. 1963 following petitioner's conviction. The court later vacated that judgment, and rehearing en banc was held. A decision has not yet been announced. Thus, questions relating to the forfeiture are not presented here.

[4]Another arsonist and Joseph Carter, an insurance adjustor who knowingly facilitated the fraudulent claims, also pleaded guilty and testified at trial.

front portion of his building, the Central Professional Building, in Tampa, Florida. Petitioner intended to use the insurance proceeds from that fire to rebuild the damaged front section of the building, which was less profitable than the newer, rear part of the building (50 Tr. 250; 56 Tr. 97). However, contrary to petitioner's plan, the fire spread to the rear part of the building and endangered the lives of several of the tenants who resided there (50 Tr. 272, 273; 67 Tr. 24, 53; 74 Tr. 32, 54, 63). Co-conspirator Joseph Carter was the insurance adjustor for petitioner's claim and helped petitioner to obtain the highest payment possible. Petitioner paid Carter $30,000 for his assistance (50 Tr. 276; 56 Tr. 104-107).

2. Although he does not contend that the evidence was insufficient for the purpose or that the jury was improperly charged, petitioner claims (Pet. 7-12) that the RICO enterprise and the conspiracy proven at trial were different from those charged in the indictment because four persons alleged in the indictment to have been members of the enterprise and the conspiracy were acquitted on those charges. His argument is frivolous. Rejecting a similar argument made with respect to a conspiracy count, the Fourth Circuit recently wrote: "The government need not win its case against all defendants in a conspiracy case in order to avoid a charge of variance. To hold otherwise would be to invite a finding of a fatal variance between indictment and proof whenever one discrete group of defendants is acquitted in a conspiracy case." *United States* v. *Diana*, 605 F. 2d 1307, 1310 (4th Cir. 1979), cert. denied, 444 U.S. 1102 (1980).

3. Petitioner also claims (Pet. 13-15) that there was a fatal variance between the counts of the indictment charging him with mail fraud and the evidence at trial. It is apparent, however, that there was no variance.

"A variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment" (*Dunn* v. *United States*, 442 U.S. 100, 105 (1979)). Even when a variance occurs, it provides ground for reversal only if it affects the defendant's substantial rights. *Kotteakos* v. *United States*, 328 U.S. 750, 757-765 (1946); *Berger* v. *United States*, 295 U.S. 78, 82 (1935).

Here, there was no variance whatsoever, because the facts charged in the indictment were proved at trial. The indictment charged that petitioner defrauded the insurance company by filing proof of loss claims stating that he did not know who set the fire, when in fact petitioner knew that Noriega had done it. The evidence at trial established that petitioner stated on the claim that the loss did not originate by any act, design, or procurement on his part or by anyone known to him and that nothing he did violated the policy conditions (56 Tr. 100-101; Gov't Exh. 62). The testimony of Noriega and Carter, however, clearly demonstrated that petitioner arranged for Noriega and Traina to set the fire (see, *e.g.*, 50 Tr. 249, 259; 56 Tr. 92-93, 97). The government therefore proved the falsity that the grand jury charged.

Petitioner contends (Pet. 13-15) that there was a variance, not because the government failed to prove the specific fraud charged in the indictment, but because the proof also showed that he committed another fraud. The court of appeals, which was familiar with the voluminous record in this case, properly rejected petitioner's claim, stating (Pet. App. 44a):

> The government offered evidence that the parties involved knew Noriega had set fire to the building. Testimony also indicated that the building's value listed on the claim was inflated. Russello argues that he was convicted of mail fraud on the latter basis, one not

> specifically charged in the indictment, and his conviction should be reversed. We disagree. We are not persuaded that the convictions were based on misrepresentation as to value. The reference to value in the testimony of a government witness was almost an aside. Russello offered experts who contradicted the government's suggestion of value. On the other hand the evidence abounds that Carter and Russello falsely denied knowing who set the fire. Russello's convictions on Counts 28 and 29 are affirmed.

We rely upon the court of appeals' analysis.

4. Petitioner also adopts (Pet. 12-13, 15) the arguments raised in his co-defendants' petitions, which are now pending before this Court. We rely on the arguments made in our Brief in Opposition to those petitions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1982